

June 30, 2006

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

V.

SEDGMAN

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

V.

DAVID GILL, employed by Sedgman

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Docket Nos. SE 2002-111  
SE 2003-69  
SE 2003-189

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

## DECISION

BY: Suboleski and Young, Commissioners

This consolidated proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act” or “Act”). Administrative Law Judge Avram Weisberger upheld citations charging contractor Sedgman with one violation each of 30 C.F.R. § 77.200 and 30 C.F.R. § 77.1710(g),<sup>1</sup> and assessed penalties for each violation, but vacated the

civil penalty for the first citation. 26 FMSHRC 873 (Nov. 2004) (ALJ). Both Sedgman and the Secretary of Labor filed petitions for review which the Commission granted.

## I.

### Factual and Procedural Background

In the spring of 2001, Jim Walter Resources (“JWR”) hired Sedgman as the general contractor on a project at JWR’s No. 4 Preparation Plant, in Tuscaloosa County, Alabama (“the prep plant”). *Id.* at 874; Gov’t Ex. 3 (MSHA Accident Investigation Report); Jt. Ex. 1 (JWR-Sedgman contract). The prep plant, which processes coal for JWR’s No. 4 Mine, is subject to four inspections each year by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Stips. at 2, ¶ 3.

Since its construction in the 1970’s, the prep plant has undergone various upgrades and modifications. 26 FMSHRC at 874. The 2001 project involved major modifications of the plant, including installation of heavy media cyclones and spirals. *Id.*; Stips. at 2, ¶¶ 5-6. Pursuant to the JWR-Sedgman agreement, Sedgman was to design and construct the prep plant modification. 26 FMSHRC at 874. At that time, Pro Industrial Welding, Inc. (“PIW”), a contractor from nearby Brookwood, Alabama, was already performing work for JWR at the prep plant, pursuant to a contract under which PIW would repair and replace deteriorated steel at the prep plant and at other JWR facilities. *Id.* at 874-75 & n.1; Stips. at 3, ¶ 9.

Consequently, Sedgman entered into a subcontract with PIW whereby PIW would provide labor, materials, equipment, and services for the prep plant modification project. 26 FMSHRC at 874. Pursuant to its pre-existing contract with JWR, PIW would continue to repair and replace steel that it discovered was deteriorated at the prep plant, in addition to the steel work involved in the modification process. *Id.* at 875.

PIW began demolition of some of the existing plant structure and removal of equipment. Stips. at 3, ¶ 11. Subsequently, in the first week of June 2001, David Gill, a Sedgman construction site manager, arrived at the project as Sedgman’s sole representative. *Id.*; 26 FMSHRC at 874.

There were a total of 39 PIW ironworkers, welders, pipe fitters, and general laborers at the JWR site. 26 FMSHRC at 875; Stips. at 3, ¶ 13. PIW’s construction supervisor was its President, Keith Crabtree, who was generally present at the site at least part of each day. 26 FMSHRC at 875. Daily direction of PIW’s construction activities was otherwise the responsibility of PIW “lead men.” *Id.*

The JWR-Sedgman contract contemplated that existing parts of the prep plant’s steel structure would be demolished in order to permit the construction of the new steel structures to

be added as part of the modification project. *Id.* at 874. Under the Sedgman-PIW contract, PIW was responsible for determining the exact method to be used to demolish such structures. *Id.*

Part of the plant modification involved connecting the steel skeleton that had been erected from the “decant” floor between the second and third floors into the existing fifth and sixth floor structure on the west side of the prep plant. *Id.* at 875; Stips. at 4, ¶ 20; Tr. 114. While doing so, on August 27, 2001, PIW encountered an overhang from the fifth floor to the seventh floor of the existing structure, which included a reinforced concrete landing extending out from the fifth floor. 26 FMSHRC at 875; Tr. 410-12. The landing, which supported a stairway between the fifth and sixth floors, was surrounded by opaque sheeting or siding. 26 FMSHRC at 875.<sup>2</sup>

PIW’s lead man at the time, Trevor Rhine, was relying upon drawings that did not include the landing, so he was surprised to encounter it. *Id.*; Tr. 410-11. Consequently, Rhine conferred with Sedgman’s representative Gill, and the two men went to the area. 26 FMSHRC at 875. The two men looked up at the landing from the second and fourth floors. *Id.* They agreed the landing would have to be removed. 26 FMSHRC at 875; Tr. 410-12.

When Rhine requested demolition advice, Gill recommended separating the landing into pieces, stringing cable slings through the pieces, and using the mobile crane on site to “fly” the pieces out. 26 FMSHRC at 875; Stips. at 5, ¶ 23. Two of the PIW workers assigned by Rhine to that part of the modification project, Ricky Fields and Gary McDonald, subsequently began the piecemeal dismantlement of the landing on the morning of August 29, 2001, while also working on connecting the steel skeleton to the existing structure. 26 FMSHRC at 875-76; Gov’t Ex. 3 at 3.

Fields and McDonald used a concrete saw to make two cuts across the width of the landing, isolating two pieces, each approximately 5 feet long. 26 FMSHRC at 876. The first piece of the landing was lifted out by the crane and cable without incident, while the second lift

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<sup>2</sup> According to the judge:

The landing consisted of a steel framework covered by a concrete slab. One 19-foot channel formed the outer (west) edge of the support steel. Four cross channels, one at each end (north and south) and two intermediate channels formed the rest of the supporting steel structure below the landing.

The steel landing structure was supported by support members from above; these were attached to the outside edge of the landing at either end (north and south) and at mid-span of the 19-foot channel that formed the outer edge of the landing.

26 FMSHRC at 875.

occurred only after an oxygen-acetylene torch was used to cut a piece of rebar that had prevented separation. Stips. at 5, ¶ 25. Early in the afternoon, Fields and the PIW crane man rigged a single chain hoist intended to support the remaining landing. Stips. at 5-6, ¶ 26; Gov't Ex. 3 at 4.

At approximately 3:30 p.m., a JWR employee saw Fields on the outer edge of the remaining landing. Stips. at 6, ¶ 28. At first Fields was kicking at what appeared to be a toe plate, but then he left the landing and returned with cutting torches. *Id.* About 10 minutes later, McDonald, who was doing steel connection work, saw Fields kneeling on the remaining portion of the landing. *Id.* at 6, ¶ 29; Gov't Ex. 3 at 4. After McDonald looked away, the landing collapsed, and Fields fell approximately 34 feet to the two-and-a-half level floor. Stips. at 6, ¶¶ 29-30; Gov't Ex. 3 at 4. He was flown by emergency helicopter to a nearby hospital but died from his injuries during surgery. Gov't Ex. 3 at 4.

MSHA investigated the accident during the next 2 weeks, and issued a report on February 4, 2002. Gov't Ex. 3 at 5; Stips. at 9, ¶ 41. There is general agreement on how the collapse occurred. In addition to removing the two landing pieces, some of the steel that supported or formed the landing was removed or cut by either Fields or McDonald or both. Stips. at 6, ¶ 27. Specifically, the 19-foot channel of the steel framework was cut at the north end of the landing, eliminating any support for the outer edge of the channel at that end as well as the stability provided by the connection at that end of the channel. 26 FMSHRC at 876. An intermediate channel cross piece that provided stability to the structure, particularly to the 19-foot channel supporting the landing, was also removed. *Id.*

This reduction in support reduced the load bearing capacity of the 19-foot channel. *Id.* Cutting the north end of the 19-foot channel also eliminated the support provided by the outer edge north end hanger, reducing the number of hangers that supported the outer edge of the platform from three to two. *Id.* When Fields cut the middle hanger, the landing failed. *Id.*<sup>3</sup>

Along with the accident investigation report, MSHA issued separate citations or orders to JWR, Sedgman, and PIW on February 4, 2002. Each was alleged to have violated the requirement in section 77.200 that mine structures are to be maintained in good repair, as well as the requirement in section 77.1710(g) that miners are to wear a safety belt and line when there is a danger of falling. Stips. at 7-8, ¶¶ 31-37.

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<sup>3</sup> The judge also credited the testimony of Sedgman's expert witness, Albert Fill, that the chain hoist attached to help support the structure actually contributed to its collapse. 26 FMSHRC at 876 n.2. A second chain hoist was found amidst the wreckage, but apparently had never been rigged to the structure. Stips. at 6, ¶ 26.

With respect to the citations issued to Sedgman, MSHA designated the violation of section 77.1710(g) as significant and substantial (“S&S”),<sup>4</sup> and on May 3, 2002, the Secretary proposed a penalty of \$160. 26 FMSHRC at 886-88; Stips. at 9, ¶ 42. The citation alleging that Sedgman violated section 77.200 was also designated as S&S and further alleged that the violation was due to Sedgman’s unwarrantable failure.<sup>5</sup> 26 FMSHRC at 877-84. On December 31, 2002, the Secretary proposed a penalty assessment of \$35,000 for Sedgman’s violation of section 77.200, nearly 11 months after the citation for the violation was issued on February 4, 2002. *Id.* at 884; Stips. at 9, ¶ 44. During that time and beyond, MSHA conducted a special investigation that culminated on April 2, 2003, in charges being brought against Gill for the section 77.200 violation under section 110(c) of the Act, 30 U.S.C. § 820(c). *See* Stips. at 9-10, ¶¶ 46-55. On August 18, 2003, the Secretary proposed a penalty of \$3,500 against Gill. *Id.* at 10, ¶ 57.

After a hearing on the Sedgman citations, the judge affirmed the S&S section 77.1710(g) citation and assessed the penalty proposed by the Secretary for it. 26 FMSHRC at 886-88. With regard to the section 77.200 citation, the judge affirmed it and found that the violation was S&S, but was not persuaded that the violation was unwarrantable or that Gill should be held individually liable for it under section 110(c). *Id.* at 877-84. The judge assessed a penalty of \$1,000, but then vacated it on the ground that the 16-month time period between the accident and the Secretary’s proposed assessment was not reasonable. *Id.* at 884-86.

The Commission granted Sedgman’s petition for review of the findings of violation and the Secretary’s petition for review of the judge’s decision regarding the penalty assessment for the section 77.200 violation.

## II.

### Disposition

#### A. Interpretation of 30 C.F.R. § 77.200

In finding a violation of section 77.200, the judge rejected the idea that section 77.200 does not apply to structures being demolished, on the grounds that the regulation does not contain such an exception and that to create one would violate the protective purposes of the

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<sup>4</sup> The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

<sup>5</sup> The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

standard, as workers would be exposed to a hazard while working in and around unmaintained structures pending demolition. 26 FMSHRC at 877-78. The judge found that, because there were extensive conditions of rust, deterioration, and corrosion in the supporting steel that rendered it no longer whole or had significantly reduced its thickness, “it was more likely than not that the supporting structures had deteriorated to a condition that was hazardous,” and concluded that Sedgman violated section 77.200. *Id.* at 880.

Sedgman maintains that the inherent logic and language of section 77.200 compels the conclusion that it does not apply to structures being demolished. Sedgman Br. at 12-16. The Secretary contends that the language of section 77.200 contains no exception for structures being demolished. Sec’y Br. at 11-13.

Section 77.200 requires that “[a]ll mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.” Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary’s interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must “look to the administrative construction of the regulation if the meaning of the words used is in doubt”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (“Deference . . . is not in order if the rule’s meaning is clear on its face.”) (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)).

Here, the judge determined that because Sedgman was responsible for the structure at issue by virtue of the demolition contract, it could be cited for the deteriorated condition of the structure at the time of demolition. 26 FMSHRC at 879-80; *see also id.* at 883 (unwarrantable failure analysis). A close reading of the citations issued to JWR and Sedgman, as well as the penalties proposed for those citations,<sup>6</sup> however, shows the Secretary was relying on more than the condition of the structure in alleging that Sedgman violated section 77.200. The judge quoted from that part of the citation issued to Sedgman that contained language similar to that found in the citation issued to JWR (26 FMSHRC at 877), but in reality the citation against

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<sup>6</sup> The Secretary proposed a penalty of \$1,270 for each of the two citations against JWR, with JWR agreeing, prior to the hearing on the Sedgman citations, to pay in a separate proceeding \$1,070 for the S&S section 77.1710(g) violation and \$655 for the S&S section 77.200 violation. Stips. at 7, ¶ 35; Jt. Ex. 5 (citations). In contrast, for the section 77.200 violations, each of which was designated S&S and unwarrantable, the Secretary assessed penalties of \$40,000 against PIW and \$35,000 against Sedgman. Stips. at 7-8, ¶ 36.

Sedgman, after referring to the condition of the structure, goes on to describe Sedgman's involvement with the demolition of the structure. The citation against Sedgman states:

The [No. 4 Mine] coal processing facility and structures were not being maintained in good repair to prevent injuries to employees. Areas of the coal preparation plant are currently under demolition and reconstruction *by employees of [PIW] who are under advisement by an on-site manager of Sedgman. This employee [of Sedgman] examined the work area and discussed the demolition procedure with [PIW] prior to the accident.* Steel members and supporting structure beneath and attached to the concrete deck area of the 5th floor level were not substantially maintained to prevent collapse of the structure. The steel beams and structure associated with the deck support showed signs of deterioration, corrosion, and fatigue which had seriously reduced their load carrying capacity. *Sedgman had inspected this area of the plant during the design phase of this project. Actions by [PIW] in conjunction with the deterioration and lack of precautionary safety measures, resulted in the failure of the supports and structure. An employee of Sedgman regularly travels on, beneath, and in close proximity to the failed structure during the course of his regular duties.*

Citation No. 7676881 (emphases added to highlight language not included in citation against JWR).<sup>7</sup>

The essence of the Secretary's allegation is that Sedgman violated section 77.200 because it had an important role in demolishing the structure, and the method of demolition that was ultimately employed exposed the PIW workers to the risk of accident or injury. Sec'y Br. at 13. According to the Secretary, under section 77.200 Sedgman, as the general contractor, was obligated to "maintain" the structure to prevent injuries and accidents to employees; that obligation continued through the demolition process for which Sedgman was responsible, and Sedgman failed in that obligation when it permitted the PIW workers to dismantle the structure in an unsafe manner. *See id.* at 16-17 ("Sedgman violated the standard because its chosen method of demolition exposed employees working on the stairwell and landing to hazards.").

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<sup>7</sup> Neither of the citations issued to Sedgman was submitted at the hearing, but a copy of each citation was attached to the respective penalty assessments in this case and are thus included in the record. The citation issued against JWR for the section 77.200 violation (Citation No. 7676879) was submitted by the parties with their Stipulations as Joint Exhibit 5.

We thus cannot agree with our dissenting colleague that the Secretary's theory of liability in this case is based "solely" on the deterioration of the steel. *See slip op.* at 26.<sup>8</sup>

As always, the "language of a regulation . . . is the starting point for its interpretation." *Dyer*, 832 F.2d at 1066 (citing *GTE Sylvania*, 447 U.S. at 108). In the absence of a statutory definition or a technical usage of a term, the Commission applies its ordinary meaning. *See, e.g., Thompson Bros. Coal Co.*, 6 FMSHRC 2091, 2096 (Sept. 1984). To "maintain" is "to keep in state of repair, efficiency or validity: preserve from failure or decline." *Webster's Third New International Dictionary* 1362 (1993). "[R]epair" when used as a noun means, among other things, "relative condition with respect to soundness or need of repairing." *Id.* at 1923.

Such definitions of the terms used in section 77.200 support the Secretary's reading of the standard and application of it to structures undergoing demolition. The concepts of "efficiency," "validity," and "soundness" are all relevant to a structure not only while it is in use prior to demolition, but during the demolition process as well, given the danger a structure can pose to those who are in its vicinity while it is being demolished. "[F]ailure" of a structure during the demolition process poses a danger to workers on or around the structure, including those employed by contractors, as this case demonstrates.<sup>9</sup>

Reading section 77.200 to prohibit demolition in an unsafe manner is particularly appropriate given that the standard plainly states its purpose: "to prevent accidents and injuries to

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<sup>8</sup> While the Secretary continues to contend the deteriorated condition of the structure is relevant to the citation against Sedgman for the section 77.200 violation, we note that the judge credited the testimony of Sedgman's expert Fill that, in this instance, even if the structure had been composed of new steel, such steel would not have been able to withstand the forces placed on the structure during its demolition, given the method of demolition that was used. 26 FMSHRC at 876 n.2. The Secretary does not argue that the judge erred in crediting Fill on this point.

<sup>9</sup> Our dissenting colleague (*slip op.* at 27-28) states that "one of the central problems in this case" is that the Secretary has not promulgated separate safety standards applicable to construction activity at surface areas of mines, as section 101(a)(8) of the Mine Act mandates she do "to the extent practicable." *See* 30 U.S.C. § 811(a)(8)). However, the legislative history of that provision explains that "[t]he requirement that standards be separately promulgated does not relieve construction operators from complying with the requirements of the Act generally . . . ." S. Rep. No. 95-181 at 24-25 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 612-13 (1978) ("*Legis. Hist.*"). Section 77.200 is one of those requirements, and the Secretary is obligated to enforce it against contractor Sedgman, particularly in an instance such as this, where contractor employees were subject to the same hazards as miners. *See Bituminous Coal Operators' Ass'n v. Sec'y of Interior*, 547 F.2d 240, 244-45 (4th Cir. 1977) (upholding application of predecessor statute to Mine Act to contractors, including those involved in prep plant construction).



employees.” By employing only those methods of demolition which do not lead to accidents or injuries to employees — an obligation that is no way unreasonable — an operator will comply with section 77.200 during the demolition of the structure. *See U.S. Steel Mining Co.*, 14 FMSHRC 973, 975-76 (June 1992) (proof of hazard from failure to maintain structure is the only prerequisite to establishing violation of section 77.200). Moreover, and perhaps most significantly, in drafting section 77.200 the Secretary did not carve out an exception to the standard for structures being demolished. Indeed, the regulation provides just the opposite, as it states that it applies to “all” structures.

Consequently, we are not persuaded by Sedgman’s argument that once demolition of the structure began, section 77.200, by its terms, was no longer applicable. Sedgman contends that demolition of a structure is the very antithesis of “maintain[ing]” it “in good repair,” because a structure being demolished is one that is being removed from any potential for future use, and thus there is no longer any need to “maintain” it “in good repair.” *See Sedgman Br.* at 13, 16. As discussed, however, those terms can also be understood to support the continued application of the standard during the demolition process. Consequently, we reject Sedgman’s interpretation of section 77.200.

Sedgman also contends that the citation should not be affirmed on the ground that the demolition process employed violated section 77.200, because a reasonably prudent person would conclude that demolishing a structure is the remedy for a state of poor repair, and that therefore an operator should not be expected to recognize that section 77.200, a standard that is general in nature, was applicable in this instance. *Sedgman Br.* at 15 (citing *Alabama By-Products Corp.*, 4 FMSHRC 2128 (Dec. 1982) and other Commission cases). According to Sedgman, all that a reasonably prudent person should have been expected to do in this instance would be to determine whether the landing was “in sufficiently ‘good repair’ to demolish.” *Id.* at 16. Section 77.200 is appropriately characterized as “general” in scope. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 360 (D.C. Cir. 1997) (“Although [section 77.200] is admittedly general, it is clear enough to provide notice of the conduct that it requires or prohibits.”). However, section 77.200 is not being interpreted to prohibit the demolition of the structure here, but rather the demolition of the structure in a manner that has been conceded to be unsafe. The citation charged Sedgman with complicity in the demolition, rather than merely holding it accountable for the pre-existing condition of the structure. Sedgman made no claim that a reasonably prudent person, taking into consideration the protective purpose of the standard applying to all structures, could have reasonably believed it could permissibly demolish a structure in a manner that creates a hazard to miners. Thus, the Commission’s “reasonably prudent person” test provides Sedgman no defense.<sup>10</sup>

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<sup>10</sup> Unlike our dissenting colleague, we do not consider statements in MSHA’s Program Policy Manual (“PPM”) regarding training regulations relevant to a reasonably prudent person’s interpretation of section 77.200. *See slip op.* at 30. The training regulations for miners working at surface mines and surface areas of underground mines explicitly exclude construction workers and shaft and slope workers under subpart C of Part 48. *See* 30 C.F.R. § 48.22(a)(1)(i). Thus,

While the judge failed to examine whether the actions taken during the demolition process violated the requirements of section 77.200, the evidence is such that it can only support the conclusion that, under the foregoing interpretation of section 77.200, a violation of section 77.200 occurred. As Sedgman's own brief outlines, based on uncontroverted testimony, the PIW employees took a number of actions contrary to demolishing the structure in a sound manner. The employees cut the main member support of the outside of the landing and removed the critical mid-span hanger before they had removed all of the concrete, thus cutting away at least two-thirds if not more of the support for the landing. Sedgman Br. at 17; Tr. 372, 595. Moreover the chain hoist they installed for support failed to supply any such support, and in fact put additional stress on the steel and connections. Sedgman Br. at 17-18; Tr. 381-82; 384, 594-97; Gov't Exs. 20-21.

The record thus supplying more than sufficient evidence to uphold the citation in this instance, remand is not necessary. See *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (citing *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (remand would serve no purpose because evidence could justify only one conclusion)). The judge's finding that section 77.200 was violated is therefore affirmed in result.

#### B. Abuse of Discretion

The judge found that the Secretary did not abuse her discretion in citing multiple operators for both the section 77.200 and section 77.1710(g) violations. 26 FMSHRC at 878-79, 887-88. With regard to the section 77.200 violation, the judge took note that JWR was responsible for maintenance of the structure while it deteriorated over the years, but the judge was persuaded that the Secretary did not abuse her discretion by also citing Sedgman because Sedgman's contract with JWR obligated Sedgman to comply with all safety laws and supervise the demolition project, and it was Sedgman that had contracted with PIW to perform the work. *Id.* at 879. With respect to the section 77.1710(g) violation, the judge concluded that the evidence established that Fields was not wearing fall protection when the landing that he was working on collapsed. *Id.* at 887. Accordingly, the judge found a violation of the requirements of section 77.1710(g) that miners wear a safety belt and line when there is a danger of falling, as there was in this instance because the part of the structure on which Fields was working had no guarding along its outer edge. *Id.* The judge further held that, given Sedgman's responsibilities under its agreement with JWR, Sedgman's right under its agreement with PIW to require PIW employees to comply with applicable safety regulations, and that Gill had on more than one occasion instructed PIW employees to stop working until they had secured adequate fall

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the PPM, consistent with the standard it is interpreting, distinguishes between maintenance or repair, and construction or demolition. Moreover, the Commission's decision in *Black Diamond Construction, Inc.*, 21 FMSHRC 1188 (Nov. 1999), is also not pertinent here, because it was based on the Part 48 training regulations which explicitly exclude construction activities. In contrast, section 77.200 covers "all mine structures, enclosures or other facilities," with no stated exceptions.

protection, the Secretary did not abuse her discretion in citing Sedgman for the violation. *Id.* at 887-88.

Sedgman maintains that, under the Mine Act, an operator can be charged only for its own violation, and that even if multiple operators can be charged, as was done here, the Secretary abused her discretion in citing the independent contractor Sedgman. Sedgman Br. at 18-19. The Secretary responds that she has unreviewable discretion in deciding to cite an owner-operator, a contractor, or both, for the violation of a standard. Sec’y Br. at 21-26.

The judge issued his decision in this proceeding, and the parties briefed it on appeal to the Commission, before the Commission issued its decision in *Twentymile Coal Co.*, 27 FMSHRC 260 (Mar. 2005), *appeal docketed* D.C. Cir. No. 05-1124 (Apr. 15, 2005) (“*Twentymile I*”). In *Twentymile II*, the Commission rejected the argument made by the owner-operator there that section 104(a) of the Mine Act, 30 U.S.C. § 814(a), cannot be read to permit the Secretary to cite an owner-operator for its contractor’s Mine Act violation. 27 FMSHRC at 263-64. The Commission reaffirmed that the Secretary can do so, but rejected the Secretary’s contention that she has unreviewable discretion in deciding which operator or operators to cite for a violation. *Id.* at 264-66. The Commission’s decision in *Twentymile II* fully answers the arguments raised by the parties here regarding whether the Secretary has the authority under the Mine Act to cite multiple operators for the same violation, and whether that authority is unreviewable by the Commission.

The Commission and courts have consistently recognized that, in instances of multiple operators, the Secretary generally may proceed against an owner-operator, an independent contractor, or both, for a violation of the Mine Act. *See id.* at 263 (citing cases). The propriety of the Secretary’s decision regarding which party to cite in such an instance is reviewed by the Commission under an “abuse of discretion” standard. *Id.* at 266.

Sedgman argues that, as the general contractor for the renovation project, it should not be cited for a violation that was solely attributable to its subcontractor. Sedgman Br. at 20-21. However, as the Secretary points out (*see* Sec’y Br. at 27-29 & n.15), in *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (Sept. 1991), the Commission held that under the Mine Act’s general system of liability without fault, just as an owner-operator may be held liable for the violations committed by its contractor, a contractor may be held liable for the violative acts of its subcontractor, and that the Secretary’s decision to cite the general contractor in such an instance would also be reviewed under the abuse of discretion standard.

With respect to the abuse of discretion standard, in *Twentymile II* the Commission stated that “[i]n applying this general test, the Commission must determine whether the Secretary’s decision to cite” an operator or contractor for violations committed by another operator or contractor “‘was made for reasons consistent with the purpose and policies’ of the Mine Act.” 27 FMSHRC at 266 (quoting *Old Ben Coal Co.*, 1 FMSHRC 1480, 1485 (Oct. 1979); *Phillips Uranium Corp.*, 4 FMSHRC 549, 551 (Apr. 1982); *Extra Energy, Inc.*, 20 FMSHRC 1, 5 (Jan.

1998)). The Commission summarized the principal factors it considers in determining whether such a decision is “consistent with the purpose and policies” of the Mine Act as follows:

(1) Whether the production-operator, the independent contractor, or another party was in the best position to affect safety matters. In this regard, one of the key questions is whether the independent contractor has adequate size and mining experience to address safety concerns.

(2) Whether, and to what extent, the production-operator had a day-to-day involvement in the activities in question. A closely related factor is “the nature of the task performed by the contractor.”

(3) Whether the production-operator contributed to the violations committed by the independent contractor.

(4) Whether the production-operator’s actions satisfy any of the criteria set forth in the Secretary’s Enforcement Guidelines. . . . The guidelines provide that enforcement action may be taken against a production operator for violations committed by its independent contractor in any of the following four situations: “(1) when the production-operator has contributed by either an act or an omission to the occurrence of the violation in the course of the independent contractor’s work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator’s miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement.” . . . [T]he four criteria overlap in certain respects with the factors separately applied by the Commission in such cases.

27 FMSHRC at 267 (citations omitted).<sup>11</sup>

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<sup>11</sup> The “Enforcement Guidelines” were issued by the Secretary as an appendix to regulations requiring that independent contractors provide certain information to production-operators before beginning work and establishing procedures under which independent contractors could obtain MSHA identification numbers. *See* III MSHA, Dep’t of Labor, *Program Policy Manual*, Part 45, at 10-16 (2003); 45 Fed. Reg. 44,494, 44,497 (July 1, 1980). The Enforcement Guidelines set forth four criteria to be used by MSHA inspectors in determining whether to cite a production-operator for the violations of its independent contractor. The Commission has repeatedly recognized that the Enforcement Guidelines are policy

Sedgman argues that the judge erred in finding that the Secretary did not abuse her discretion in citing Sedgman for the section 77.1710(g) violation. According to Sedgman, it did not supervise Fields, Gill did not observe Fields not wearing fall protection where he should have been wearing it, Gill's actions did not contribute to the violation, and before the accident, Gill had instructed PIW employees he observed lacking fall protection that they should be wearing such protection. Sedgman Br. at 19-20. Sedgman also maintains that Field's failure to wear fall protection was an aberration in this instance, and that punishing one operator for aberrational conduct of another serves no purpose under the Mine Act. *Id.* at 20.<sup>12</sup>

The Secretary contends that the findings of fact made by the judge demonstrate that the Secretary did not abuse her discretion in citing Sedgman for the section 77.1710(g) violation. Sec'y Br. at 27-29. The Secretary points to Sedgman's contract with JWR, which requires Sedgman to comply with all safety laws and supervise the prep plant renovation project, as well as Sedgman's contract with PIW, pursuant to which Sedgman had the right to order PIW to comply with safe work practices. *Id.* at 27-28. The Secretary also relies on evidence that Gill in fact did correct the safety practices of PIW employees on several occasions. *Id.* at 28.

The judge's decision issued, and the parties' briefs to the Commission were submitted, before the Commission's decision in *Twentymile II*, so neither the judge nor the parties addressed the extent to which the factors identified in *Twentymile II* with respect to owner-operators and their contractors are also applicable to contractors and their subcontractors. In *Bulk Transportation*, the Commission considered, among other things, the Secretary's Enforcement Guidelines in determining whether the Secretary abused her discretion in citing the independent contractor for its subcontractor's violation. 13 FMSHRC at 1360-61. To the extent the relationship between a contractor and its subcontractor is similar to the relationship between an owner-operator and its contractor, we will use the analytical framework we set forth in *Twentymile II* in applying the abuse of discretion standard.

We believe there is substantial evidence in the record, as we have examined it under *Twentymile II*, to support the judge's conclusions that the Secretary did not abuse her discretion in citing Sedgman with respect to both the section 77.200 violation and the section 77.1710(g)

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statements that are not binding on the Secretary and do not alter the compliance responsibilities of production operators or independent contractors. *E.g., Mingo Logan Coal Co.*, 19 FMSHRC 246, 250-251 (Feb. 1997), *aff'd*, 133 F.3d 916 (4th Cir. 1998).

<sup>12</sup> Sedgman also contends that it should not be charged with a violation of section 77.200 in this instance, given that it was only a contractor, and not the operator of the plant, and it was the operator, JWR, that was responsible for the structure over the long period of time during which it deteriorated. Sedgman Br. at 20-22. As we have found, however, Sedgman was not cited by the Secretary due to the pre-existing condition of the structure, but rather because of the method employed in demolishing the structure. *See supra*, slip op. at 6-7.

violation.<sup>13</sup> For instance, in *Twentymile II*, in determining whether the contractor or the owner-operator also cited for the violation was in the best position to prevent the violation, the Commission held that the contractor was, because the contractor was carrying out customized mining activities and performing those duties autonomously, and the violations involved the contractor's equipment. 26 FMSHRC at 268-69.

In contrast, the violations here revolve around the actions of PIW employees Fields and McDonald. There is no evidence that PIW was hired because of its special expertise to perform a unique task. Rather the evidence is that Sedgman decided to use PIW to supply, among other things, the labor for the prep plant project. 26 FMSHRC at 874; Stips. at 3, ¶ 9. Sedgman was obligated under its contract with JWR to supply such labor as was needed to complete the project, and to supervise the project to its completion. Jt. Ex. 2, Sec. 2.0 at 3. Consequently, the Sedgman-PIW agreement required that PIW "prosecute [its] work at such times and in such order as [Sedgman] considers necessary," and provided that if PIW did not do so Sedgman could ultimately declare PIW in default under the contract. Jt. Ex. 3 at 2 (Art. IV). Thus, unlike the relationship between the contractor and the owner-operator in *Twentymile II*, there is no evidence that PIW was operating autonomously from Sedgman.

In addition, consistent with those terms of the Sedgman-PIW agreement, there is ample record evidence that Sedgman had significant day-to-day involvement in the activities that led to the violations. Structural demolition was expressly within the scope of the work Sedgman agreed to perform for JWR. Jt. Ex. 2, Sec. 2.0 at 5. While the judge did find that PIW was responsible for determining the exact method that would be used to demolish various structures during the project (*see* 26 FMSHRC at 874), it is also true that PIW's lead man, Rhine, specifically consulted with and sought the advice of Sedgman's site manager, Gill, regarding the demolition of the structure in question here. *Id.* at 875; Stips. at 5, ¶ 23.<sup>14</sup>

Moreover, as the judge found, under the Sedgman-PIW agreement, Sedgman had the right to order PIW to correct unsafe practices, and if PIW failed to do so, Sedgman could have, in its discretion, terminated the contract with PIW. 26 FMSHRC at 888; Jt. Ex. 3 at 5 (Art. XVIII). As discussed by the judge, Gill, at various times during the project, ordered PIW employees who

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<sup>13</sup> When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>14</sup> Thus, this case is unlike *Twentymile II*, where the Commission found a total lack of evidence regarding the owner-operator's involvement in the violations. *See* 26 FMSHRC at 270-72.

should have been tied off to stop working and do so. 26 FMSHRC at 888.<sup>15</sup> Thus, there is record evidence that Sedgman not only supervised the work of the PIW employees, but that the supervision included the employees' compliance with safe work practices.<sup>16</sup>

The foregoing also establishes that criteria in the Secretary's aforementioned Enforcement Guidelines have been satisfied in this case. Sedgman both supervised and worked intimately on the project with PIW. Its failure to observe and correct both violations was a significant omission on its part. If Gill, during the course of his supervision of the project that day, had at some point visited the landing and seen how it was being demolished, it is clear he would have stopped the PIW workers from using, or continuing in, the dangerous method of demolition they had undertaken. Tr. 539-42. Given the terms of Sedgman's contract with PIW, it is plain that Gill would have been acting well within Sedgman's right to stop the PIW workers from so proceeding. Thus, we also conclude that another criterion in the Enforcement Guidelines was met in this instance, as Sedgman had significant control over the conditions in question.<sup>17</sup>

Finally, we note that this is not a case in which the Secretary merely cast a broad net to cite all of the operators at the JWR plant. While the Secretary issued multiple citations in this case, each citation appears to have been carefully tailored to reflect the nature and extent of the involvement of the party cited in the section 77.200 and section 77.1710(g) violations. *See supra* slip op at 7 n.7; Jt. Exs. 4-5.

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<sup>15</sup> Consequently, we cannot agree with Sedgman's characterization of Fields' failure to wear a safety belt as aberrant conduct in this instance. *See* Sedgman Br. at 20.

<sup>16</sup> Commissioner Suboleski notes that operators may assist contractors to comply with federal mining regulations without exercising substantial management control that would lead to liability by an operator for the violations of its independent contractor. As the U.S. Court of Appeals for the D.C. Circuit has reasoned, "Government regulations constitute supervision not by the employer, but by the state." *Local 777, Seafarers Int'l Union v. NLRB*, 603 F.2d 862, 875 (D.C. Cir. 1978) (determination of status of taxi cab drivers as "employees" or "independent contractors" under the National Labor Relations Act). The court further explained that, "because the employer cannot evade the law . . . in requiring compliance with the law he is not controlling the [independent contractor]. It is the law that controls the [independent contractor]." *Id.*; *see also Bryant v. Dingess Mine Serv.*, 10 FMSHRC 1173, 1185 (Sept. 1988) (Commissioner Doyle, dissenting). Use of this reasoning avoids the paradoxical result that operators who assist their contractors in complying with the regulations to enhance miner safety receive dual citations, while those who ignore the potentially unsafe work practices of their contractors do not.

<sup>17</sup> Gill's oversight of the project also means that he easily could have been on or around the structure while it was demolished, thus satisfying the additional criteria in the Secretary's Enforcement Guidelines that a Sedgman employee was exposed to the hazard posed by the section 77.200 violation.

For the foregoing reasons we affirm the judge's determinations that the Secretary did not abuse her discretion in citing Sedgman for the section 77.200 and section 77.1710(g) violations.

C. Penalty for Section 77.200 Violation

In assessing the penalty after finding that Sedgman had violated section 77.200, the judge found that the gravity of the violation was relatively serious, as he had detailed in concluding that the violation was S&S. 26 FMSHRC at 884. He also found, consistent with finding the violation not to be unwarrantable, that the level of negligence was less than that originally alleged by the Secretary in proposing the penalty. *Id.* Placing "considerable" weight on this factor, and "consider[ing]" the remaining penalty factors of section 110(i) of the Mine Act, the judge found a penalty of \$1,000 to be appropriate for the violation. *Id.*

The judge then addressed Sedgman's request to vacate the penalty because it had not been proposed within a reasonable time, as required by section 105(a) of the Mine Act, 30 U.S.C. § 815(a). 26 FMSHRC at 884-86. The judge concluded that the time between the accident and the issuance of the accident investigation report (more than 5 months) and the nearly 11-month time period between the investigation report and the penalty proposal resulted in an unreasonable delay. Also finding that the Secretary had failed to provide support for her stated explanation for the 11 months taken to propose a penalty after issuing the citation for the section 77.200 violation, the judge vacated the penalty assessment. *Id.* at 885-86.

1. The Judge's Decision to Vacate the Penalty Assessment

The Secretary maintains that under the Mine Act, the Commission cannot vacate a penalty assessment based on a finding that there was an unreasonable delay in the proposal of the penalty, and that even if it can do so, it may not without a finding that the operator was prejudiced by the delay. Sec'y Br. at 30-42. According to the Secretary, the judge in any event erred in calculating the amount of time at issue in this case, and further erred in failing to recognize that the amount of time was reasonable given the particular facts and circumstances of this case. *Id.* at 43-48. Sedgman responds that the judge acted well within Commission authority under the Mine Act in vacating the assessment (Sedgman Br. at 32-33), and that he correctly followed Commission precedent on the issue. *Id.* at 22-31.

Section 105(a) provides in pertinent part that "[i]f, after an inspection or investigation, the Secretary issues a citation or order . . . , he shall, *within a reasonable time* after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed . . . for the violation cited . . . ." 30 U.S.C. § 815(a) (emphasis added). Consequently, the Commission has held that, while delay on the Secretary's part in proposing a penalty may not vitiate the civil penalty proceeding and the finding of a violation,<sup>18</sup> an inordinate

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<sup>18</sup> The legislative history of the Mine Act states with regard to section 105(a) that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible,



and unjustifiable delay might well vitiate the imposition of the penalty itself. *Twentymile Coal Co.*, 26 FMSHRC 666, 682 (Aug. 2004), *rev'd on other grounds*, 411 F.3d 256 (D.C. Cir. 2005) (“*Twentymile I*”). The requirement in section 105(a) that the Secretary propose a penalty assessment “within a reasonable time” does not impose a jurisdictional limitations period, but rather turns on whether the delay is reasonable under the circumstances of each case, as the Commission examines whether adequate cause existed for the Secretary’s delay in proposing a penalty and considers whether the delay prejudiced the operator. *Salt Lake County Rd. Dep’t*, 3 FMSHRC 1714, 1716-17 (July 1981); *Medicine Bow Coal Co.*, 4 FMSHRC 882, 885 (May 1982); *Steele Branch Mining*, 18 FMSHRC 6, 13-14 (Jan. 1996); *Black Butte Coal Co.*, 25 FMSHRC 457, 459-61 (Aug. 2003).

The Secretary’s argument that the Commission lacks the authority to vacate a penalty assessment on the ground that the penalty proposal was unreasonably delayed was essentially rejected by the Commission in *Twentymile I*. See 26 FMSHRC at 686-88. The reviewing court passed on the question when the Secretary repeated that argument on appeal. See 411 F.3d at 261-62.

The Secretary now maintains that *Tazco, Inc.*, 3 FMSHRC 1895, 1896-97 (Aug. 1981), in which the Commission stated that the Mine Act requires that some penalty must be assessed by the Commission for each violation found, prevents the Commission from vacating a penalty assessment in a case while allowing the underlying citation to stand. See Sec’y Br. at 35. In *Tazco*, at issue was a judge’s decision, as part of approving a settlement, to sua sponte suspend a penalty in its entirety due to the operator’s termination of the foreman responsible for the underlying violation. 3 FMSHRC at 1895-96. Consequently, we do not find *Tazco* controlling on the question of whether, once he has assessed a penalty, a judge may vacate the assessment due to the Secretary’s delay in proposing the penalty. The Commission stated that under section 110 of the Mine Act, 30 U.S.C. § 820, the Commission “must assess some penalty” for each violation found” (3 FMSHRC at 1897), and that is what the judge did here, before vacating the assessment pursuant to section 105(a).<sup>19</sup>

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and the [Senate] Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding.” S. Rep. No. 95-181, at 34 (1977), *reprinted in Legis. Hist.* at 622 (1978).

<sup>19</sup> By reducing the penalty to zero in *Tazco* on the grounds that he did, the judge there was, in effect, applying a factor not found within section 110(i), 30 U.S.C. § 820(i), to determine the penalty amount, a practice which the Commission has consistently found to be prohibited by the terms of the Mine Act. See *RAG Cumberland Res., LP*, 26 FMSHRC 639, 658 (Aug. 2004) (citing cases), *aff’d sub nom. Cumberland Coal Res., LP v. FMSHRC*, No. 04-1427, 2005 WL 3804997 (D.C. Cir. Nov. 10, 2005) (unpublished). Thus, the broader pronouncements contained in *Tazco* were unnecessary to the decision the Commission reached. Moreover, we cannot ignore the import of the exact terms used in section 110 of the Mine Act. Section 110 provides that the Secretary “shall . . . assess[] a civil penalty,” but with respect to the Commission it only states

In reviewing a judge's determination that there has been an unreasonable delay in the Secretary's proposal of a penalty under section 105(a), the Commission applies an abuse of discretion standard, though any factual determinations the judge made in arriving at his conclusion are subject to substantial evidence review. *Black Butte*, 25 FMSHRC at 459-60. The abuse of discretion standard includes errors of law. *Utah Power & Light Co., Mining Div.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991).

Because the judge here applied the Commission's decision in *Twentymile I*, and that decision was subsequently reversed on appeal, we must vacate the judge's order. However, even if our decision in *Twentymile I* were controlling, we would vacate the judge's decision here on the ground that he committed a clear error of law.

In *Twentymile I*, the court rejected the Commission's interpretation of how the time period at issue should be calculated. In *Twentymile I*, as the court recognized there was an accident and a subsequent week-long investigation that resulted in MSHA issuing an order to the operator alleging a violation of a Mine Act regulation. 411 F.3d at 258. The court did not mention, however, that the order was terminated 4 days later by the MSHA inspector who had issued it, after the operator took actions in response to the order. *See* 26 FMSHRC at 670. Instead, the court jumped forward 6 months, to the issuance of the accident investigation report. *See* 411 F.3d at 258.

The Secretary argued in *Twentymile I* that under section 105(a), the time period at issue did not start until the accident investigation report was issued. 411 F.3d at 261. The court found this interpretation of the Mine Act reasonable and because it came from the Secretary, deferred to it instead of to the Commission's interpretation. *Id.* at 262. The court based its conclusion on the language of section 105(b)(1)(B) of the Mine Act, which requires the Secretary in assessing a penalty to consider the operator's good faith "'in attempting to achieve rapid compliance *after notification of a violation.*'" *Id.* (quoting 30 U.S.C. § 815(b)(1)(B) (emphasis in decision)). The court apparently read "notification of a violation" to include any MSHA report issued regarding the events that gave rise to the violation, including an accident investigation report issued after the citation or order charging a violation was issued and even terminated. Believing that Congress included the operator's subsequent response to such a report among the relevant penalty criteria, the court held that it could not be plausible that any determination of the reasonableness of the time in which it took to assess the penalty could begin to run before the time an operator could respond to such notice of the violation. *Id.*

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that "[t]he Commission shall have *authority* to assess all civil penalties provided in [the] Act. 30 U.S.C. § 820(a), (i) (emphasis added). The Commission in *Tazco* quoted these provisions, but did not recognize the difference in the language employed.

This case does not present the same issue as *Twentymile I*, because the accident investigation report was issued on the same day as the citation.<sup>20</sup> 26 FMSHRC at 884. The judge, however, did not calculate the period at issue with respect to that date. Rather, he included the 5 months between the accident and the issuance of the accident investigation report, even though up until the latter occurred, there was no citation or order for which a penalty could be proposed. *See* 26 FMSHRC at 884-86.

The judge thus clearly considered the accident as the “starting point” for determining the reasonableness of the time it took for a penalty to be proposed, but that is contrary to the plain meaning of the Mine Act. Section 105(a) designates the starting point of the period at issue as “the termination of such inspection or investigation” and “inspection or investigation” clearly refers to an inspection or investigation that leads to the issuance of a section 104 citation or order. 30 U.S.C. § 815(a). Here, where there is no evidence that there was a delay between the end of an investigation and the issuance of the citation or order,<sup>21</sup> the starting point is the issuance of the citation or order for which the Secretary is proposing a penalty.<sup>22</sup>

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<sup>20</sup> In any event, we believe the Secretary’s interpretation deferred to by the court is contrary to the plain meaning of the Mine Act. The reference to “notification of a violation” in section 105(b)(1)(B) clearly refers not to investigation reports, but rather to citations and orders, as it is a citation or order that supplies an operator with “notification of a violation,” and provides the impetus for an operator’s “attempt[] to achieve rapid compliance” with the Mine Act. Investigation reports can issue regardless of whether an accident or incident results in any citation or order, and where there are citations or orders, such reports may be issued before, concurrent with (as occurred here), or well after (as occurred in *Twentymile I*) any citation or order issued as a result of the matter being investigated.

<sup>21</sup> We note that 5 months is not an unreasonable amount of time during which to conduct an investigation of a fatal accident, particularly a complex one such as this, where the chain of events must be re-constructed.

<sup>22</sup> In addition, another Mine Act provision directly governs the reasonableness of a time period before which a citation or order issues. Section 104(a), which provides only for citations and orders, and not penalties, states in pertinent part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, *with reasonable promptness*, issue a citation to the operator.

30 U.S.C. § 814(a) (emphasis added). There has been no claim here that the Secretary failed to issue the citation to Sedgman “with reasonable promptness,” and below Sedgman limited its

Because the time period between termination of the investigation and the penalty assessment was less than 11 months in this case, remand for a determination of whether such a delay was reasonable under section 105(a) is not necessary. Such a delay in this case is not unreasonable, particularly given that there was a related ongoing section 110(c) investigation. *See Steele Branch*, 18 FMSHRC at 13-14 (11-month delay in case in which Secretary failed to proffer any explanation found not to be unreasonable in light of Commission's notice of Secretary's high caseload at the time); *see also Black Butte*, 25 FMSHRC at 458-61 (accepting Secretary's explanation for 13-month delay); *cf. Twentymile I*, 411 F.3d at 262 (holding 11-month time period the court considered to be at issue not unreasonable without further explanation).<sup>23</sup>

## 2. The Judge's Penalty Assessment

We turn now to the penalty the judge initially assessed pursuant to section 110(i) of the Mine Act before vacating it under section 105(a). The Secretary argues that the judge erred in failing to explain why he reduced the penalty assessed from the proposed amount of \$35,000 to \$1,000, and in failing to make findings with respect to four of the six penalty criteria of section 110(i). Sec'y Br. at 48-49. Sedgman maintains there was ample reason for the judge to reduce the penalty as he did, and there is record evidence regarding each of the six penalty criteria that supports the penalty the judge assessed. Sedgman Br. at 36-39.

While Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.<sup>24</sup> *Westmoreland*

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claim of unreasonable delay to the time period between issuance of the citation and the Secretary's penalty proposal. Sedgman Post-Hearing Br. at 34 n.11.

<sup>23</sup> Below, the Secretary stated that the reason for the passage of time with respect to both the Sedgman penalty proposal and the 110(c) charge against Gill was problems with the implementation of a new computer system for her assessments, and she promised to offer evidence in support of this claim. Stips. at 11, ¶ 62. As the judge discussed in his decision, however, no such evidence was ever submitted. *See* 26 FMSHRC at 885. Having promised an explanation, the Secretary should have further addressed the issue, instead of leaving the judge with no explanation.

<sup>24</sup> Section 110(i) states in pertinent part:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the

*Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). In *Sellersburg*, the Commission stated that “[w]hen an operator contests the Secretary’s proposed assessment of penalty, thereby obtaining the opportunity for a hearing before the Commission, findings of fact on the statutory penalty criteria *must* be made.” 5 FMSHRC at 292 (emphasis added). In addition, Commission Procedural Rule 30(a) provides:

In assessing a penalty the Judge *shall determine* the amount of penalty in accordance with the six statutory criteria contained in section 110(i) . . . and incorporate such determination in a written decision. The decision *shall contain findings of fact and conclusions of law on each of the statutory criteria* . . . .

29 C.F.R. § 2700.30(a) (emphases added). In reviewing a judge’s penalty assessment, the Commission determines whether the penalty is supported by substantial evidence and is consistent with the statutory penalty criteria. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000). While “a judge’s assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal . . . .” *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

Here, the judge made findings with respect to two of six factors, gravity and negligence, but not the other four. *See* 26 FMSHRC at 884. Three of those four factors were stipulated to — that Sedgman is a small operator, it had no previous history of violations, and the penalty would not affect Sedgman’s ability to continue in business. *See* Stips. at 13, ¶¶ 74, 76, 78.<sup>25</sup> However, the Commission requires the *judge* to make findings of fact on all of the section 110(i) criteria in order to provide the penalized party and the regulated community with the appropriate notice as to the basis upon which the penalty is being assessed, as well as to supply the Commission and any reviewing court with the information needed to accurately determine if the penalty assessed by the judge is appropriate, excessive, or perhaps insufficient. *Cantera Green*, 22 FMSHRC 616, 621 (May 2000) (citing *Sellersburg*, 5 FMSHRC at 292-93); *see also* *Hubb Corp.*, 22 FMSHRC at 612; *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000). Consequently, in *Jim Walter Resources, Inc.*, 19 FMSHRC 498, 501 (Mar. 1997), the

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operator was negligent, [4] the effect on the operator’s ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

<sup>25</sup> Sedgman cites the narrative filed with the penalty petition as evidence of the last factor, as it states the citation was abated within a reasonable period of time. Sedgman Br. at 38 n.6.

Commission vacated a judge's penalty assessment where the judge failed to "make specific findings on all six penalty criteria," including criteria that were the subject of stipulations by the parties.

The need for all six criteria to be addressed in the judge's decision is even more important in cases such as this, where the penalty assessed by the judge substantially diverged from the one proposed by the Secretary.<sup>26</sup> "If a sufficient explanation for [such a] divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Sellersburg*, 5 FMSHRC at 293.

Here, it appears that the judge substantially diverged from the penalty the Secretary proposed because the judge concluded that the Secretary had failed to prove "high negligence" on the part of Sedgman. After finding the gravity of the violation to be high, which was consistent with his conclusion that the violation was S&S, the judge stated:

[F]or the reasons set forth above [where Sedgman's violation was found not to be unwarrantable] the level of negligence is less than that originally found by the Secretary as set forth in the narrative findings for a special assessment appended to the petition. Thus, in weighing the various factors set forth in Section 110(i) of the Act, I accord considerable weight to the less than high degree of negligence. Placing considerable weight on this factor, and considering the remaining factors in section 110(i) of the Act, I find that a penalty of \$1,000.00 is appropriate for this violation.

26 FMSHRC at 884. The narrative to which the judge refers simply states that the violation resulted from the operator's high negligence, an issue he decided in conjunction with the unwarrantable failure allegation. *See id.* at 882-84. The judge's analysis of the evidence of negligence was limited to Sedgman's knowledge of the condition of the structure prior to demolition work. *Id.*

The judge's analysis of Sedgman's negligence was thus consistent with his analysis of the underlying citation issued to Sedgman, which he read as being limited to the pre-existing condition of the structure. As we have found, however, the citation also was directed at Sedgman's involvement in the demolition of the structure. Consequently, the judge should have conducted a negligence analysis more in keeping with the conduct alleged by the citation to be violative. Because he did not, substantial evidence does not support his negligence finding.

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<sup>26</sup> The judge reduced the penalty proposed by the Secretary by approximately 97%. 26 FMSHRC at 884; Sec'y Br. at 48-49.

Given that, in determining the degree of Sedgman’s negligence, the judge did not address Sedgman’s conduct as it related to actions alleged in the citation to constitute a violation of section 77.200 — the demolition of the landing — we are vacating the \$1,000 penalty he initially assessed, and remanding the case to him. *Cf. U.S. Steel*, 6 FMSHRC at 1432 (vacating gravity and negligence findings due to lack of support in the record). On remand the judge can analyze the evidence of Sedgman’s negligence consistent with the allegations contained in the citation, address that factor, as well as make explicit findings on all five other section 110(i) penalty criteria, and reassess an appropriate penalty.

### III.

#### Conclusion

For the foregoing reasons, we affirm the judge’s determinations that Sedgman violated 30 C.F.R. §§ 77.200 and 77.1710(g), vacate the judge’s decision regarding the penalty to be assessed for the section 77.200 violation, and remand the case to him for a reassessment of that penalty consistent with the instructions contained herein.

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

Commissioner Jordan, concurring:

I agree with the analysis adopted by Commissioner Suboleski and Commissioner Young in holding that 30 C.F.R. § 77.200 applies to structures in the process of being demolished, and that therefore they must be maintained in good repair. I also agree with their ruling that Sedgman violated this regulation. I am also in accord with their discussion and holding in section II.C.2. of their opinion, in which they vacate the penalty initially assessed by the judge and remand the case to him for reassessment.

I write separately, however, because, although I agree with the holding of my colleagues that the Secretary did not abuse her discretion in citing Sedgman for the violations of section 77.200 and 30 C.F.R. § 77.1710(g), I disagree with their analysis, which applies standards set forth in the majority opinion in *Twentymile Coal Co.*, 27 FMSHRC 260 (Mar. 2005), *appeal docketed* D.C. Cir. No. 05-1124 (Apr. 15, 2005) (“*Twentymile II*”). In my dissent in that case I expressed the view that the majority had erred in raising the level of the evidence necessary to support the Secretary’s enforcement decision. *Id.* at 279, 282. Consequently, in this case I would apply the standards articulated by Commission precedent prior to the issuance of the *Twentymile II* decision in finding that the Secretary did not abuse her discretion in citing Sedgman. However, even applying the *Twentymile II* criteria utilized by my colleagues in this case, I agree with them that no abuse of discretion occurred here.

Regarding the judge’s decision to vacate the penalty assessment, I agree with my colleagues that the judge erred in considering the accident as the starting point for determining the reasonableness of the time it took for the Secretary to propose a penalty, as in this case that point should be the issuance of the relevant citation or order. I also agree that because the time period between the termination of the investigation and the penalty assessment was less than 11 months, the delay was not unreasonable. Accordingly, I join in the holding of my colleagues to vacate the judge’s order.

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Mary Lu Jordan, Commissioner



Chairman Duffy, dissenting in part:

I dissent from my colleagues' decision on the question of whether Sedgman violated 30 C.F.R. § 77.200<sup>1</sup> because I believe that the majority decision is inconsistent with the language of the standard, MSHA's own interpretation of its regulations, and Commission precedent. The majority is attempting to uphold a citation issued to Sedgman, an independent contractor, based on a legal theory different from that relied upon by the Secretary. In doing so, the majority reads the standard in an unduly expansive way that is not logical and lacks legal support.

This case involves a tragic accident in which Ricky Fields, an employee of PIW, Sedgman's subcontractor, died when the landing on which he was kneeling collapsed and fell 34 feet. 26 FMSHRC 873 (Nov. 2004) (ALJ). Fields was located on the landing because he was in the process of demolishing it. The landing collapsed and fell after he cut the middle hanger supporting the landing — an illogical and unexpected action.<sup>2</sup> Even though Fields was standing and kneeling on a landing that was in the process of being demolished and could have lost his balance or fallen in any number of ways, he was not wearing a safety belt and line and had no other fall protection. 26 FMSHRC at 876.

In my view, the primary violation in this case was an extremely serious violation of 30 C.F.R. § 77.1710(g),<sup>3</sup> which requires fall protection for miners at a surface work area. MSHA issued citations based on section 77.1710(g) to JWR, Sedgman, and PIW. I agree that Sedgman is liable for violating section 77.1710(g).<sup>4</sup> Although Fields was an employee of PIW, Sedgman's on-site representative, David Gill, had previously observed PIW employees working without being equipped with necessary fall protection (26 FMSHRC at 888) and therefore was aware of the potential for serious injury. Moreover, I conclude that Gill was sufficiently involved in the planning of the demolition on the day in question (*id.* at 875-76) that Sedgman should be liable for the lack of fall protection.

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<sup>1</sup> Section 77.200 provides that “[a]ll mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.”

<sup>2</sup> Earlier, Fields and another PIW employee had removed two portions of the landing platform and had cut two steel supports that were providing support and stability to the landing. 26 FMSHRC at 876.

<sup>3</sup> Section 77.1710(g) provides that “[e]ach employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear . . . [s]afety belts and lines where there is a danger of falling.”

<sup>4</sup> I also agree with my colleagues that the Secretary did not abuse her discretion in citing JWR, Sedgman, and PIW for the violation of section 77.1710(g).

The principal issue on review in this case involves the additional citations issued to JWR, Sedgman, and PIW for alleged violations of section 77.200. The Secretary argues that Sedgman is liable under this standard because “Sedgman [had] to do something so that employees working on the stairwell and the landing during demolition would be protected from the hazards of deteriorated steel.” Sec’y Br. at 13. According to the Secretary, “Sedgman violated the standard because the evidence conclusively established that the supporting steel had deteriorated to a condition that was hazardous, and therefore, the supporting steel was not maintained in safe condition while employees were performing demolition work on the structure.” *Id.* at 14 n.6 (emphasis in original). In other words, the Secretary’s theory of liability is based solely on the fact that the steel supports holding the landing had deteriorated over the years, and she interprets the standard to apply to any work activities being conducted on the landing while the steel was in a deteriorated condition.<sup>5</sup> Thus, the Secretary’s theory of liability is based on the deteriorated condition of the steel supports; she does not contend in her brief that section 77.200 applies to the demolition process in and of itself.

I am firmly convinced that there is no legal or factual basis for finding Sedgman liable for violating section 77.200. The Secretary’s theory as to Sedgman’s liability simply makes no sense and appears to be an effort to find an additional violation because an accident resulted in a fatality. Although the Secretary argues that the violation resulted because of the deteriorated condition of the steel, Sedgman could not have become liable for more than 20 years of pre-existing deterioration simply because it signed a contract to demolish certain structures in the prep plant and to construct new ones. That deterioration could only be attributed to JWR, the

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<sup>5</sup> Notwithstanding the language from the Secretary’s brief quoted above, my colleagues argue that the Secretary’s theory is not based solely on the deteriorated condition of the steel supports by pointing to the following sentence: “Sedgman violated the standard because its chosen method of demolition exposed employees working on the stairwell and landing to hazards. Slip op. at 7 (quoting Sec’y Br. at 16-17). However, the context in which the sentence is contained indicates that the Secretary continued to base Sedgman’s liability on the deteriorated steel. In the discussion preceding the sentence, the Secretary maintained that the varying interpretations of what constituted compliance with section 77.200 offered by MSHA personnel were consistent with the Secretary’s position at trial and that there were different methods that could be used to achieve compliance (such as using sound vibration tests to determine whether the steel had deteriorated). The Secretary then states that “Sedgman did not violate the standard because it failed to follow the advice of MSHA personnel.” Sec’y Br. at 16. After that comes the sentence relied upon by the majority: “Sedgman violated the standard because its chosen method of demolition exposed employees working on the stairwell and landing to hazards.” *Id.* at 16-17. Read in this context, it is clear that the sentence means that Sedgman was liable because demolition proceeded before anyone had addressed the hazards posed by deteriorated steel.

owner and operator of the plant for that time period, or PIW, which had signed a separate contract with JWR under which it was to repair or replace deteriorating steel in the plant.<sup>6</sup>

The Secretary's theory of liability regarding Sedgman becomes even more problematic because the judge below credited the testimony of Sedgman's expert, Albert Fill, that the accident was *not* caused by the deteriorated condition of the steel (26 FMSHRC at 876 n.2) — a finding that the Secretary does not challenge on appeal. Rather, the accident was caused by the removal of critical support members from the landing while Fields was still standing or kneeling on it. If the landing would have fallen regardless of the condition of the steel, then the accident occurred not because structures associated with the landing had been allowed to deteriorate, but because the demolition activities themselves were being conducted in an unsafe manner.

The majority seeks to uphold the violation under an alternative theory not relied upon by the Secretary — that the “maintained in good repair” language in section 77.200 can be read to apply to the process of conducting demolition activities regardless of whether a structure is deteriorated or not. Slip op. at 6-8. In other words, the majority implicitly rejects the Secretary's theory that Sedgman is liable because of the deteriorated condition of the steel supports. However, in an attempt to show that the Secretary actually subscribed to their alternative theory as well, my colleagues point to certain language in Sedgman's citation that mentioned its role in demolishing the landing. They mistakenly assert that this language demonstrates that the Secretary is really arguing that Sedgman is liable because of the “unsafe manner” in which the PIW employees demolished the landing.<sup>7</sup> Slip op. at 7. The majority then expansively reads the “maintained in good repair” language in section 77.200 to apply to any situation where a structure is in the process of being demolished.

I believe that interpreting section 77.200 to apply to demolition activities is an attempt to fit a square peg into a round hole and arises largely from the Secretary's confused theory of the case advanced at trial and reiterated on review before this Commission. More than that, it highlights what is one of the central problems in this case: the Secretary has never promulgated

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<sup>6</sup> I believe that section 77.200 could properly be applied to JWR or PIW because hazardous conditions existed at the landing irrespective of whether demolition activities were to take place.

<sup>7</sup> The majority's characterization of the Secretary's theory as being based on unsafe demolition activities regardless of whether the structure was deteriorated is erroneous for at least three reasons. First, although Sedgman's citation does contain language that is different from the language used in JWR's citation, Sedgman's citation still emphasizes the allegation that Sedgman is liable because of the deteriorated condition of the steel supports. Slip op. at 6-7 (quoting Citation No. 7676881). Second, in her brief, the Secretary never relies upon, or even mentions, the different language in Sedgman's citation. Third, as discussed above (slip op. at 26), the language of the Secretary's brief makes clear that the Secretary's theory of Sedgman's liability is based on the deteriorated condition of the steel supports. Sec'y Br. at 13, 14 n.6.

construction/demolition standards for miners working at surface areas of mines, despite the requirement that she do so under section 101(a)(8) of the Mine Act, 30 U.S.C. § 811(a)(8),<sup>8</sup> and she has never promulgated training standards for mine construction workers, even though section 115(d) of the Act, 30 U.S.C. § 825(d), expressly mandates that the Secretary promulgate such training standards. The absence of any applicable MSHA standards governing the demolition of structures at surface areas of mines was underlined when the Secretary sought to introduce evidence at trial regarding the requirements of construction standards of the Department of Labor's Occupational Safety and Health Administration ("OSHA") specifically addressing demolition activities. Tr. 468-71. The judge denied the request because he concluded that OSHA's standards were not relevant to a proceeding under the Mine Act.<sup>9</sup> Tr. 479-80. In any event, as shown below, the majority's strained reading of the standard is contradicted by MSHA's official reading of its own standards and Commission case law regarding how those standards must be interpreted.

Commission case law makes it clear that when broad regulatory language such as that contained in section 77.200 — "[a]ll . . . structures . . . shall be maintained in good repair" — is to be applied in a particular case, the Commission utilizes the "reasonably prudent person" test to determine whether the operator had adequate notice of the meaning of the standard and its application under the circumstances of the case involved. *E.g., U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). However, in this case, the majority does not apply that test but instead simply declares how the standard should be read. The majority states that, despite Sedgman's contentions that demolition of a structure is the antithesis of maintaining it in good repair, the words of the standard "can also be understood to support the continued application of the standard during the demolition process." Slip op. at 9.<sup>10</sup>

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<sup>8</sup> My colleagues assert that the Secretary's failure to have promulgated construction/demolition standards is irrelevant because the legislative history of section 101(a)(8) indicates that "construction operators" must comply with "the requirements of the Act generally." Slip op. at 8 n.9. I do not disagree that Sedgman had to comply with "the requirements of the Act generally," as any independent contractor would be required to do so. Strictly speaking, however, section 77.200 is not a requirement of the Act. Instead, it is a safety standard promulgated by the Secretary, which, in my view, she is stretching beyond reason in order to cover gaps left by her failure to promulgate construction/demolition rules.

<sup>9</sup> In 1979, MSHA preliminarily proposed adopting the OSHA construction standards as MSHA standards (44 Fed. Reg. 52,258 (Sept. 7, 1979)), but that initiative was later abandoned. 47 Fed. Reg. 48,548 (Oct. 28, 1982).

<sup>10</sup> The majority asserts that the "reasonably prudent person" test provides Sedgman no defense here. Slip op. at 9. I disagree. The question presented in this case is whether a reasonably prudent person would have understood that section 77.200 applied to demolition activities at all, not whether a reasonably prudent person would have chosen the illogical, unsafe

I conclude that, under the “reasonably prudent person” test, Sedgman did not have adequate notice that section 77.200 applied to the demolition of the landing. Under the test, which is applied from the perspective of an objective observer familiar with the mining industry, the primary question is whether a “reasonably prudent person . . . would recognize a hazard warranting corrective action within the purview of the applicable regulation.” *Alabama By-Products*, 4 FMSHRC at 2129. Among the factors to be considered would be any relevant “MSHA announcements or policy memoranda . . . that were . . . publicly available or brought to the attention of the operator.” *U.S. Steel*, 27 FMSHRC at 442. Application of the test in this case shows that a “reasonably prudent person” would have concluded that section 77.200 does not apply to structures that are being demolished.

First, the words of the standard are silent with regard to demolition activities. Although the majority emphasizes that “[a]ll structures” are to be maintained in good repair, this does not fully answer the question of whether the standard applies to demolition activities (as opposed to, say, the repair or replacement of deteriorated steel).<sup>11</sup> The key point is that maintaining a structure in good repair is antithetical to demolishing it. Try as they may, the majority cannot persuasively argue that a “reasonably prudent person” would understand that a structure must *simultaneously* be maintained in good repair and demolished.<sup>12</sup> The majority also urges that demolition must be carried out in a way that prevents accidents. That position is laudable, but the standard does not say that. The majority is really treating section 77.200 as a kind of “general duty clause” to encompass activities well beyond maintenance and repair. However, the Mine Act, unlike the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (2000), contains no such clause, and section 77.200 is not a general duty clause in any event.

Second, beyond the regulatory language, which does not specifically address demolition, a “reasonably prudent person” reviewing MSHA’s relevant policy pronouncements would conclude that demolition activities are not covered under the “maintained in good repair” language of section 77.200. Although section 77.200 was promulgated in 1971, MSHA has apparently never issued a single policy document or other official statement indicating that

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method used.

<sup>11</sup> It is implicit in the standard that the “maintained in good repair” requirement would apply only to structures that are not being demolished, which is the opposite of being maintained in good repair. Similarly, if a standard provided that “all structures shall be demolished in a way that will prevent accidents and injuries to employees,” it would be understood that the requirement would not apply literally to all structures, but only to those that are being demolished.

<sup>12</sup> See also *The Industrial Co. of Wyoming*, 12 FMSHRC 2463, 2478-79 (Nov. 1990) (ALJ) (judge ruled that section 77.200 did not provide fair warning that it would apply to the construction of buildings because buildings under construction cannot be “maintained” and “repaired”).

demolition activities are covered by section 77.200. Given MSHA's silence for more than 30 years, a "reasonably prudent person" would not know that demolition activities are meant to be covered by the standard.

Third, MSHA, through its policy manual, has in fact stated that there is a clear distinction between maintenance or repair activities, on the one hand, and construction or demolition activities, on the other hand. III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 48, at 36-37 (2003) ("*PPM*"). In discussing training requirements for employees of independent contractors working at surface areas of mines, MSHA stated that "construction work" includes "demolition." *Id.* at 36. Furthermore, MSHA stated that "maintenance or repair work" includes "upkeep or alteration." *Id.* at 37. The major significance of this dichotomy is that an employee of an independent contractor engaged in construction or demolition work at a surface area is *not* required to receive training under 30 C.F.R. Part 48, while a similar worker engaged in maintenance or repair work must receive training under 30 C.F.R. Part 48. *PPM* at 37. Thus, MSHA's policy manual recognizes that maintenance or repair activities are mutually exclusive from construction or demolition activities: a worker at a surface area can be engaged in either construction/demolition activities or maintenance/repair activities, but not both simultaneously. *Because of this critical distinction, the "reasonably prudent person," upon reviewing MSHA's policy manual, would affirmatively conclude that section 77.200, which addresses maintenance and repair, does not apply to demolition activities.*

Finally, in *Black Diamond Construction, Inc.*, 21 FMSHRC 1188 (Nov. 1999), the Commission recognized the distinction between maintenance or repair work and demolition work. It upheld an award under the Equal Access to Justice Act, 5 U.S.C. § 504, against the Secretary because MSHA ignored that distinction when it issued a citation to an independent contractor. MSHA had issued the citation to an independent contractor because one of its employees who was engaged in demolition activities had not received training required for workers engaged in maintenance and repair activities. The Commission discussed the definitions of "maintenance or repair" and "demolition" set forth in MSHA's *PPM* and emphasized the clear distinction between the two types of activities. 21 FMSHRC at 1195-96. In concluding that the Secretary's position was not substantially justified, the Commission ruled that MSHA had ignored the language of the *PPM* in issuing the citation and stated that "giving undue emphasis to the hazards contractor employees are exposed to would render meaningless the exceptions to Mine Act coverage." *Id.* at 1197. The Commission expressly rejected the Secretary's argument that the *PPM* should be construed broadly because of the nature of the hazards to which a contractor's employee would be exposed. *Id.* In short, the Commission not only rejected the Secretary's attempt to disregard the distinction between "maintenance or repair" and "demolition," it ruled that such a position was not even substantially justified, i.e., "the Secretary's position was not reasonable in law or fact." *Id.* at 1198. Further, the Commission's decision makes clear that, regardless of the nature of the hazards to which contractors' employees

may be exposed, the language of MSHA's standards cannot be ignored or unduly stretched to apply to situations where there was originally no intent to do so.<sup>13</sup>

In summary, the majority's effort in this case to read the maintenance and repair language in section 77.200 as applying to demolition activities cannot be squared with the meaning of the words, the Secretary's own policy determinations, or the Commission's decision in *Black Diamond*. For all these reasons, I dissent from this portion of the majority's decision and would reverse the judge's ruling that Sedgman violated section 77.200.<sup>14</sup>

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Michael F. Duffy, Chairman

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<sup>13</sup> My colleagues attempt to dismiss the significance of MSHA's *PPM* and the *Black Diamond* decision by stating that MSHA has explicitly treated maintenance or repair as being distinct from demolition or construction. Slip op. at 9-10 n.10. The majority's footnote actually makes my point. A reasonably prudent person, when faced with the question of whether a standard that requires structures to be maintained in good repair applies to demolition (which is antithetical to maintaining a structure in good repair), would determine, after reviewing MSHA's standards and *PPM*, that MSHA has consistently drawn a bright line between maintenance or repair and demolition or construction because they are mutually exclusive activities.

<sup>14</sup> Notwithstanding my conclusion that Sedgman did not violate section 77.200, I concur with my colleagues' reasoning in vacating the judge's actions relating to the civil penalty for that violation.

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